The Relative Concept of Judicial Independence

THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA.

Reviewed by Mark S. Hurwitz*

Introduction

Should judicial offices be subject to electoral processes? That question is endlessly debated, usually from a normative perspective. Groups like the American Judicature Society (AJS) and the American Bar Association (ABA) spend much of their resources vehemently contending that judicial elections are bad for justice and should be replaced.1 Others argue instead that judicial elections satisfy the American tradition of accountability to the public, and thus as important policy makers judges should be held electorally accountable.2

In The People’s Courts: Pursuing Judicial Independence in America,3 Jed Handelsman Shugerman takes a more nuanced approach to the topic of judicial elections. In this meticulously researched book, Handelsman discusses the history of judicial elections in the United States, while placing elections squarely within the debate concerning judicial independence and accountability. That is, while he discusses the benefits and burdens of judicial elections and other judicial selection systems, Handelsman counters that the answer is not as simple as claiming the goals of judicial selection are the mutually exclusive concepts of independence or accountability. As he states in his conclusion:

The adoption of partisan judicial elections in the nineteenth century and then their partial rejection/reformation in the twentieth century both

---


2. See generally CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (arguing that judicial elections positively enhance the relationship between American citizens and the judiciary by promoting judicial accountability).

were the result of a widespread commitment to the idea of judicial independence. This seeming paradox is possible because judicial independence is often a relative concept, and the understandings of judicial independence have changed over time. Relatedly, the perceptions of “good” and “bad” politics have also changed over time.\textsuperscript{4}

With this theme in mind, Shugerman illustrates the events that led to changes (and sometimes stability) in judicial selection over time, with a focus on the history and longevity of elections. As he does so, Shugerman shows the specifics of particular cases while also putting events and transitions in historical context. Indeed, that is how I will proceed in this Review. I first will summarize Shugerman’s arguments in historical and chronological order, as he advances in his book. Then, I will address the arguments made by Shugerman.

I. Stages of Judicial Selection and Independence over Time

Shugerman contends that the transformation of judicial selection over time in the United States, particularly with respect to judicial elections, entails the concepts of separation of powers and judicial independence. How do elections relate to judicial independence? Shugerman discusses that in some detail when he demonstrates how elections came about in the United States in the mid-nineteenth century, and how these institutions have reacted to different contextual influences over time. To introduce his thesis, Shugerman states that “this book argues that the story of judicial elections is also the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means.”\textsuperscript{5}

More particularly, in his view, contextual aspects of political life in America influenced judicial selection. “Each generation feared concrete evils: imperious kings, incompetent legislators, corrupt political parties, corrupting special interests, demagoguery, and the masses.”\textsuperscript{6} Confronting those evils led to attempted changes (some successful, some not) to judicial selection in the states. Those changes in selection systems as they relate to issues of judicial independence extend to Shugerman’s five stages of judicial selection over the course of American history: (1) “premodern unseparated judiciary,” (2) “judicial aristocracy,” (3) “judicial democracy,” (4) “judicial meritocracy,” and (5) “judicial plutocracy.”\textsuperscript{7} Shugerman’s book tackles each of these periods in some detail.

\begin{flushleft}
\textsuperscript{4} Id. at 271.
\textsuperscript{5} Id. at 5.
\textsuperscript{6} Id. at 8.
\textsuperscript{7} Id. at 9.
\end{flushleft}
A. Judicial Aristocracy Develops from a Premodern Unseparated Judiciary

According to Shugerman, colonial courts in America were not at all independent, as they were dependent upon other political actors with little protection that comes from separation of powers. During this premodern time period, which he addresses in Chapter 1, judges served at the pleasure of the sovereign King. While courts earned some separation from the crown at various points during colonial history, King George III reasserted the position that judges are subject to the monarch’s rule. “The colonial period is filled with instances of American colonists seeking to give their judges tenure ‘during good behavior’ as protection from the Crown, and repeatedly the British pushed back.”

Shugerman goes on to discuss many of the details of colonial life, particularly as it related to the judiciary and how change to the judiciary eventually came about via the American Revolution—thus the title of this chapter, “Declaring Judicial Independence.” The debate over judges during this period, both pre- and post-Revolution, concerned not so much how judges were selected but instead the circumstances of their tenure. Since colonial judges were easily removed by the Crown if the former did not please the latter, the early period in American history was defined by a more clear separation of powers with specific terms of office. In this regard, Shugerman illustrates how some states provided for tenure “during good behavior” while others had specific term limits. But the key aspect of these institutions was independence from executive control.

The federal Constitution, of course, provided for presidential appointment of justices with senatorial approval, with effective lifetime appointment based on serving during good behavior. Shugerman notes that there was not much debate over judicial selection at the Constitutional Convention in Philadelphia, as the Framers simply desired to include a federal judiciary that was nonexistent during the period governed by the Articles of Confederation. However, Shugerman notes that the Framers did care about judicial independence from the Executive, which remained a sore point from the colonial era. The Constitution provided protections for an independent

---

8. Id. at 15–16.
9. Id. at 15–17.
10. Id. at 18.
11. Id. ch. 1.
12. See id. at 23–26 (recounting the debate between Federalist support for life tenure in order to check “the imprudence of democracy” and the Anti-Federalist fear that a judiciary with unchecked terms of service would create an ongoing “oligarchic” system discounting the concerns of the people).
13. Id. at 18–20.
14. Id. at 20.
15. U.S. CONST. art. II, § 2, cl. 2; id. art. III, § 1.
16. SHUGERMAN, supra note 3, at 20.
17. See id. at 19–20 (noting that prior to the Revolution, “independence of the judiciary from the Crown was a key issue in a majority of the colonies”).
judiciary by mandating there be a Supreme Court and by providing justices with lifetime appointment (with a “high threshold for removal” based on impeachment) and salary guarantees. Thus, the federal Constitution was fairly clear on judicial independence.

During the debate over ratification in the states, however, Shugerman asserts that the terms of judicial independence began to shift. That is, in Shugerman’s view, Alexander Hamilton changed the idea of judicial independence when he contended in Federalist No. 78 that the Constitution’s lifetime tenure provision was protection of the Judiciary from illegitimate legislative power, whereas previously judicial independence was considered protection against illegitimate executive power. This is the first of many examples of Shugerman’s argument that judicial independence is relative, as he contends that “independent from whom or what?” is an important question when considering the notion of judicial independence.

Thus, the premodern period of weak judges and courts became a judicial aristocracy in the early constitutional period, protected by separation of powers. Shugerman claims this stems from Hamilton’s idea of judicial independence: “Hamilton’s explanation reflects the idea of judicial aristocracy—not in the pejorative sense of a privileged class of nobility, but in the sense of a separate and independent estate, enjoying the privileges of life tenure so that it can check the excesses of both monarchy and democracy.” While the Anti-Federalists were not pleased with this scenario, they were not able to change the institution of selection and tenure as enumerated in the Constitution.

Shugerman concludes this chapter by explaining that there were many elected officials in the colonial period who had judicial responsibilities, but that there were no judicial elections per se in the colonial period or even in the early constitutional period. The time for judicial elections would come in the states, of course, but it took some time and some doing.

B. Judicial Democracy

Shugerman spends the bulk of his book (Chapters 2 through 8) analyzing the stage of judicial history that he refers to as judicial democracy. While judicial elections are critical to this era, it did not begin with elections. In fact, for the seeds of judicial elections to grow, there first needed to be a sense that courts were powerful yet vulnerable. That is the subject of Chapter 2,

18. Id. at 21.
19. Id. at 22.
20. Id. at 7.
21. Id. at 23.
22. Id. at 24–27.
23. Id. at 27–29.
24. See id. at 30 (asserting that judicial elections were “uncommon in the early phase of judicial democracy”).
“Judicial Challenges in the Early Republic.” Shugerman argues that while the early constitutional period is credited with an expansion of judicial power, particularly by means of Chief Justice Marshall’s assertion of judicial review in *Marbury v. Madison*, from a practical perspective courts were not as independent, and *Marbury* not as consequential, as conventional wisdom presumes. Indeed, during this period there were numerous attacks on courts, often led by “Radical Jeffersonians” who advocated greater political control of courts and the abandonment of common law, while contending that the legal profession that controlled the Judiciary was “evil.”

Shugerman maintains that judicial review was not used all that much during this time period. Of course, the first time the U.S. Supreme Court utilized the power of judicial review after *Marbury* was in the infamous *Dred Scott v. Sanford* decision, half a century after Chief Justice Marshall’s assertion of the power. Even in the States, judicial review was not employed all that often. And, while there were some judges who applied judicial review more than occasionally—particularly in New York, Kentucky, Tennessee, and Missouri—in the end the legislatures in these states, not the courts, won the ensuing battles between these branches of government. His point in this chapter is that notions of separation of powers and judicial review found in various laws and texts were insufficient to protect judges, who were “often swept aside by the stronger force of party politics and democratic power.”

The consequence of these strong-arm tactics by legislatures, Shugerman argues, is the rise of judicial elections, as discussed in Chapters 3 through 5. In Chapter 3, “Judicial Elections as Separation of Powers,” Shugerman uses a number of case studies to show how political parties and interest groups embraced Jacksonian themes of populism. This included a push for elections in all political offices, including the Judiciary. Interestingly, Shugerman argues that the rationale for employing judicial elections was to bring about

25. *Id.* ch. 2.
26. 5 U.S. (1 Cranch) 137 (1803).
27. *See Shugerman, supra* note 3, at 31 (citing instances of state politicians “sweeping [judges] off the bench or abolishing their jobs” in response to assertions of the power of judicial review).
28. *Id.* at 49.
29. *See id.* at 31 (stating that exercise of “judicial review was either rare or nonexistent from the Founding through the 1830s”).
31. *See Shugerman, supra* note 3, at 31 (finding that the average state supreme court “invalidated only one or two state statutes per decade through the 1830s”).
32. *Id.* at 53.
33. *Id.* at 56.
34. *Id. ch.* 3.
35. *See id.* at 66 (describing how the Whole Hog party fought for separation of powers and judicial independence in Mississippi and noting that their victory resulted in election of all Mississippi’s judges).
accountability to the people while increasing separation of powers and judicial independence from corrupt or incompetent legislatures.36

During this period of time, Mississippi was the first state to adopt judicial elections in 1832.37 President Andrew Jackson endorsed judicial elections as part of what is commonly known as the era of Jacksonian democracy. Yet, Shugerman shows that only Mississippi formally embraced judicial elections during the Jackson Administration (1829–1837); indeed, no other state implemented judicial elections even during Jackson’s lifetime (he died in 1845).38 His point is that elections came about after the Jacksonian era, as the push during this time period was for judicial independence in the states.39

Instead of Jacksonian democracy, Shugerman contends in Chapter 4, “Panic and Trigger,” that there were two turning points that led more directly to judicial elections: (1) the banking crisis and economic depressions of the late 1830s and early 1840s, and (2) the New York Constitutional Convention of 1846.40 The blame for much of the nation’s economic woes was placed at the doorstep of various state legislatures.41 Thus, the push for judicial elections reached a critical mass, as the argument among those favoring elections was that this institution would check the lowly legislatures while increasing judicial independence.42

This argument was made and accepted by the delegates to the New York Constitutional Convention, who overwhelmingly approved a new constitution establishing a new court system, with all of its judges subject to elections and specified terms of office.43 In turn, this “triggered a national revolution in judicial politics” as many states soon adopted elections in the late 1840s and 1850s.44

Shugerman entitles Chapter 5 “The American Revolution of 1848,” due to what he sees as a constitutional revolution in the states between 1844–1853, when twelve existing states adopted new constitutions and four entered the Union with new constitutions.45 During this time period, many states embraced judicial elections as part of an antilegislative agenda.46 That is, states supported judicial elections not only as a check on legislatures, but also to bring about accountability, as judges would be agents of the people.47 But, Shugerman argues that elections were about more than accountability, as they

36. Id. at 57.
37. Id.
38. Id. at 77.
39. Id. at 77, 84.
40. Id.
41. Id.
42. Id. at 84–85.
43. Id. at 98–99.
44. Id. at 102.
45. Id. at 103.
46. Id. at 104–105.
47. Id. at 105.
were designed to increase judicial independence and as judiciaries would be more professional and rise above politics. And, once again Shugerman brings context to bear, showing that while adopting judicial elections at first had little to do with the issue of slavery, that changed in the 1850s as “slavery entered judicial politics more directly.”

What evidence does Shugerman bring to bear that courts were stronger and more professional after becoming electoral institutions? Shugerman points out that state courts were much more likely to utilize the power of judicial review during this period than at any previous time in the nation’s history. This is the subject of his Chapter 6, “The Boom in Judicial Review.” Shugerman claims that judicial elections increased the use of judicial review, as judges were now making countermajoritarian arguments in favor of judicial review. Shugerman’s counterintuitive argument is stated most clearly as follows: “ Judicial power and judicial independence have thrived in America because they can be defended simultaneously as the guardians of democracy and the guardians against too much democracy.”

While judicial elections were successful in bringing about a check on legislatures, thus promoting judicial independence, storm clouds soon arose on the horizon after the Civil War. As discussed in Chapter 7, “Reconstructing Independence,” partisan politics began to infuse judicial elections. The solution proposed and adopted in a number of states was not to get rid of elections but to lengthen terms of office. Once again, judicial independence was the key ingredient, as many felt that longer judicial tenures, while potentially sacrificing accountability a bit, would decrease the influence of political parties and corruption. Shugerman also shows how accountability did not decrease even with the extended terms of office, as elected judges proved to be sensitive to those current events he uses as case studies.

Nevertheless, partisan politics continued to influence judicial elections. Chapter 8’s “The Progressives’ Failed Solutions” follows the early twentieth-century reform movement. In particular, Shugerman asserts that Progressives initially attempted to eliminate partisan problems stemming from the Lochner era by bringing about nonpartisan elections, but these reform efforts failed. Shugerman concludes that “[n]onpartisan elections produced
less judicial accountability to the people and less judicial independence from politics.58

Then, a new wave of judicial reformers entered the picture, beginning with Roscoe Pound’s famous speech before the ABA.59 After this seminal moment, reform groups such as the AJS and ABA entertained various new selection mechanisms, each designed to obviate political influence from the courts.60 Shugerman includes these new selection systems in his chapter on failed solutions because ideas like merit selection and retention elections did not take hold during the Progressive Era.61 In part, these new approaches failed because neither the public nor political elites were willing to accede their control to legal elites—at least not yet. While “[t]he Progressive Era was littered with failed judicial reforms, . . . it planted an idea that grew through the rest of the century,”62 Indeed, these proposals soon brought about the next stage of Shugerman’s judicial politics: the era of meritocracy.

C. Judicial Meritocracy

Beginning during the Great Depression and continuing on through the 1970s, the era of judicial meritocracy dominated judicial selection.63 While AJS had proposed years earlier a selection system centered on retention elections and nominating commissions, it was not until the 1930s that judicial elections would finally begin to give way to this new selection method.64 In Chapter 9, “Crime, and the Revival of Appointment,” Shugerman illustrates the events that led a number of states to consider, and some to adopt, what is conventionally known as the merit system.65 While merit is often referred to as the Missouri Plan due to that state being the first to adopt this system in 1940, it was California that first approved a version of merit in 1934.66 Shugerman offers interesting insight into why Missouri, not California, is credited by name with this system: in California the Governor, not a nominating commission, is the initiator in selection.67 He also discusses the influence of Chief Justice Earl Warren, then an Oakland prosecutor, in changing judicial elections in California.68 Why did this selection system advocated by the AJS and ABA pass at this point in time and not during the Progressive era? Simply put, Shugerman contends that economic conditions

58. Id. at 173.
59. Id.
60. Id. at 174–75.
61. Id. at 175–76.
62. Id. at 176.
63. See id. at 178–79 (describing the emergence of merit reforms during the Great Depression and their continuance through the 1970s).
64. Id.
65. Id. at 179–80.
66. Id. at 195, 197.
67. Id. at 197.
68. Id. at 184–91.
contributing to a crime wave, as well as local events in California and Missouri, all pushed voters over the edge and a form of merit selection over the top.\textsuperscript{69}

Another factor, according to Shugerman, is that merit was advocated by business interests that aligned themselves with the AJS/ABA proposals.\textsuperscript{70} In particular, labor unions were very adept at winning partisan elections, including judicial elections.\textsuperscript{71} Taking notice of this, “business interests changed their approach, from a strategy of winning partisan elections to a strategy of getting rid of partisan elections in favor of professional appointment.”\textsuperscript{72} This new selection system would not have come about, Shugerman argues, without the alignment of business interests, legal interest groups, and a populace fed up with a poor economy and excessive crime.\textsuperscript{73}

The meritocracy era gained strength in post-War America. Again, context was critical, as Shugerman offers that Cold War attitudes triggered reform based on merit.\textsuperscript{74} Interestingly, neither the AJS nor the ABA referred to the merit system until the late 1950s, even though civil service reform had been called “merit” since the Progressive Era in the early twentieth century.\textsuperscript{75} This confluence of events led to the popular rise of merit in the states. “In the late 1950s and early 1960s, ‘merit’ captured a national perspective, connecting equality of opportunity to nonpartisan expertise. These Cold War ideological shifts set the stage for merit’s spread.”\textsuperscript{76}

In propounding this selection system, the AJS and ABA emphasized the institution of nomination by commission, not retention elections.\textsuperscript{77} As well, a new notion of judicial independence, compounded with an emphasis on the rule of law, led to the spread of merit, as Shugerman shows in more case studies.\textsuperscript{78} Times once again would change, leading to Shugerman’s final stage of judicial politics.

\textbf{D. The Current Era of Judicial Plutocracy}

How is judicial politics a plutocracy? Shugerman contends in Chapter 11, “Judicial Plutocracy,” after 1980, that it is not about a wealthy class controlling the judicial branch.\textsuperscript{79} Instead, he asserts it concerns the massive increase in campaign spending that has taken control of all kinds of

\textsuperscript{69}. \textit{Id.} at 193–94.
\textsuperscript{70}. \textit{Id.} at 206.
\textsuperscript{71}. \textit{Id.}
\textsuperscript{72}. \textit{Id.}
\textsuperscript{73}. \textit{Id.} at 207.
\textsuperscript{74}. \textit{Id.} at 215.
\textsuperscript{75}. \textit{Id.} at 174, 216–17.
\textsuperscript{76}. \textit{Id.} at 218.
\textsuperscript{77}. See \textit{id.} at 194–95 (detailing the ABA’s move toward supporting the nominational appointment process in accord with AJS).
\textsuperscript{78}. \textit{Id.} at 239–40.
\textsuperscript{79}. \textit{Id.} at 241.
judicial elections, whether partisan, nonpartisan, or retention. Conservative interests and business groups often aligned in the tort wars with campaign expenditures designed to rid courts of judges they did not care for (such as Justice Rose Bird and her colleagues in California in the 1980s), and to endorse judicial candidates they supported (including Karl Rove’s campaigns for Justice Tom Phillips and others).

Shugerman transitions between competitive elections and retention elections, showing how the influence of money is similar and different in these systems. He also discusses the pros and cons of merit, falling somewhere in the middle of this debate. For instance, at one point he claims that “[p]olitics and influence inevitably find their way into any system of judicial selection.” Then, he says that merit promotes judicial independence and judicial job security, and while merit selection is not “nonpolitical,” it is “multipolitical or pluralistic, and it furthers the separation of powers by creating a different selection mechanism from . . . party-controlled elections.”

After discussing these eras of judicial politics, Shugerman offers summation and prescription in a concluding chapter, “Interests, Ideas, and Judicial Independence.” He contends that elections are deeply ingrained institutions in American politics, and that each historical stage has been influenced by judicial accountability and independence. Moreover, judicial independence is a relative concept, changing over time. Shugerman concludes with a strong defense of the rule of law, which he seems to equate with judicial independence. These concepts are more important than impartiality and nonpartisanship, which instead are aspirational but remain essential to the functioning of courts. He concludes, “At the start of the twenty-first century, we face a new crisis in judicial politics and special interests. If we have learned from history, it is also a new opportunity for redeclaring judicial independence.”

II. Shugerman’s Theory of Relativity

Shugerman has written a fascinating book that is scrupulously researched. For instance, I received a grant from the Michigan Supreme Court Historical Society to study the unique selection system for the Michigan Supreme Court. During my research on the history of a single state court, I engaged in detailed archival research and unearthed many documents that for the most part had not seen the light of day for some time. One of the important

80. Id.
81. Id. at 241–53.
82. Id. at 255.
83. Id. at 259.
84. Id. at 267–68.
85. Id. at 272.
86. Id. at 272–73.
87. Id. at 273.
pieces of evidence located during my research was an article discussing why a 1934 ballot initiative in Michigan failed and the prospects for the upcoming 1938 merit proposal.88 To Shugerman’s credit, he cites this same article while discussing Michigan’s deliberation with, and the failure of, merit selection.89 This is but one example of Shugerman’s conscientious research design as he seems to leave almost no stone unturned.

There is much more to like about The People’s Courts. In particular, Shugerman provides a historical context for judicial elections, showing that they are deeply ingrained in American politics, but also how various interests have supported and opposed this selection system over time. As well, the inclusion of current events in their historical contexts and their influences on judicial politics is a key feature of this book. In other words, politics is not lost on Shugerman’s take on judicial politics, and scholars of many fields should take note of this approach.

Shugerman deserves much credit for exemplifying that judicial independence is broader than its colloquial, even scholarly, usage. In other words, what is judicial independence and why is it important? Shugerman shows this can mean independence from executive oversight, from legislative power, or from popular accountability. Moreover, at various points in the history of judicial politics, advocates for particular selection systems exploited the argument of providing courts with independence as a way of fostering support for that selection system. In many ways, this is the strongest contribution of this book.

Nevertheless, I have a few points of criticism. For instance, a central theme of his book is that judicial elections should be considered as the pursuit of judicial independence. Since this goes against conventional wisdom, Shugerman could have discussed some of the literature on judicial elections as accountable mechanisms. In particular, Bonneau and Hall have written a provocative book on judicial elections, in which they show with much empirical evidence the positive aspects of elections.90 While Shugerman cites their book, his arguments would have been much more persuasive had he engaged in some of the arguments made by Bonneau and Hall in some detail. While each supports elections, they do so for different reasons. In the words of Bonneau and Hall, “[J]udicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens


89. SHUGERMAN, supra note 3, at 197 n.90 (citing Brand, supra note 88).

90. BONNEAU & HALL, supra note 2.
and the bench."91 In other words, elections limit independence by enhancing public accountability. Since this is very different from Shugerman’s argument, more on this point would have enhanced his thesis.92

Speaking of empirical evidence, while Shugerman effectively includes a number of graphs and tables showing how elections and other important issues came about in history, he does not make use of empirical evidence regarding the arguments in his book. I realize this is not a book that utilizes empirics by design, even though the topic and arguments scream out for empirical verification.93 Nevertheless, I would have liked to see evidence beyond his verbal arguments. For instance, even though judicial elections did not take hold until after President Jackson’s term, the theme and influence of Jacksonian democracy continued to rage long after Jackson’s administration. Thus, stating that it was not the Jacksonian era that caused a surge in judicial elections because they did not occur until later is an argument that could have been (perhaps even should have been) subject to empirical verification.

In this regard, Shugerman seems to blur the lines between the Jeffersonian and Jacksonian eras and their respective influence. While both presidents contended that exercise of judicial power was often inappropriate, it was unclear whether certain events were the result of Jeffersonian or Jacksonian politics. In a similar vein, Shugerman writes: “A closer examination of these events illustrates that the early American courts were not as cohesive or independent as the received lore of the Marshall Court has portrayed.”94 Surely, conventional wisdom provides that the Marshall Court induced judicial power throughout the country. Nevertheless, scholars have been arguing for quite some time that this was not necessarily the case, and Shugerman could have at least cited to some of the literature here, as his is not a lone voice in this matter.95

91. Id. at 2.

92. Similarly, there is a growing literature on the influence of campaign expenditures on judicial elections and behavior, which Shugerman ignores. See generally, e.g., Chris W. Bonneau & Damon M. Cann, Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections, 73 J. Pol. 1267 (2011) (examining the effect of institutional campaign finance restrictions on the performance of incumbents and challengers); Damon M. Cann, Justice for Sale? Campaign Contributions and Judicial Decisionmaking, 7 St. Pol. & Pol’y Q. 281 (2007) (exploring possible conflicts of interests arising when an attorney, who has contributed financially to a judge’s campaign, then appears in court before that same judge); Melinda Gann Hall & Chris W. Bonneau, Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections, 52 Am. J. Pol. Sci. 457 (2008) (investigating “whether judicial election campaign spending increases citizen participation in the recruitment and retention of judges”).

93. For an example of a recent book that employs empirical evidence with respect to judicial independence, see Tom S. Clark, The Limits of Judicial Independence (2011).

94. Shugerman, supra note 3, at 49.

95. See, e.g., Michael W. McConnell, The Story of Marbury v. Madison: Making Defeat Look Like Victory, in Constitutional Law Stories 13, 22–23 (Michael C. Dorf ed., 2004) (arguing that the proposition established in Marbury v. Madison, recognizing the authority of the courts to decline enforcement of a statute deemed unconstitutional, was not particularly controversial at the time); Elliot E. Slotnick, The Place of Judicial Review in the American Tradition: The Emergence of an Eclectic Power, 71 Judicature 68, 70 (1987) (positing, for example, that despite the fact that Chief
Finally, Shugerman’s argument that judicial independence is a relative, perhaps even nebulous, concept is a useful one. How independence is viewed by elites and masses at any given point in history matters in many ways and for a variety of reasons. Well done. However, the problem here concerns specificity of his argument. That is, when you assert that a concept is relative and transforms over time, then it can become somewhat effortless to fit whatever puzzle piece you may have into the available slots, simply because you can. In other words, it is difficult to state with precision how or why independence matters when that concept is incessantly shifting.

Shugerman does a nice job in demonstrating that the arguments in favor of several potential changes to selection systems were often caged in terms of judicial independence. However, that is different from asserting that “the story of judicial elections is also the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means.”96 Yes, at least sometimes. That is, as Shugerman shows, in the mid-nineteenth century, some advocates for elections used independence from legislative abuse as a rationale for that selection mechanism. But, the contemporary debate on elections turns more on issues of accountability, and thus limiting judicial independence.97

These criticisms aside, this is a very useful book that scholars of judicial politics in general, and selection systems more particularly, will find enlightening and engaging. Shugerman brings to bear a number of difficult concepts, and he adroitly addresses them by articulating a fresh approach to the old yet continually important debate concerning judicial independence. All told, *The People’s Courts* is a significant addition to the literature.

---

Justice Marshall enunciated the doctrine of judicial review in *Marbury v. Madison*, the doctrine had previously been recognized in various other settings).


97. See generally, e.g., Bonneau & Hall, *supra* note 2 (explaining that proponents of judicial elections argue that these elections promote accountability, since judges must answer to their electorate for their decisions).